



DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-98-3599; PD-19(R)]

Hazardous Materials: The New York State Department of Environmental Conservation Requirements on Gasoline Transport Vehicles

AGENCY: Pipeline and Hazardous Materials Safety Administration, Department of Transportation (DOT).

ACTION: Dismissal of petition for reconsideration of an administrative determination of preemption.

SUMMARY: This proceeding was initiated in February 1998, when the National Tank Truck Carriers, Inc. (NTTC) applied to the Pipeline and Hazardous Materials Safety Administration¹ (PHMSA) for a determination that the HMTA preempted certain marking and record keeping requirements of the New York State Department of Environmental Conservation (NYSDEC). PHMSA found that the HMTA preempted the NYSDEC requirements because the requirements were not substantively the same as requirements in the HMR on the marking, maintaining, repairing, or testing of a package or container that is represented, marked, certified, or sold as qualified for transporting hazardous material. NYSDEC's petition for reconsideration of that decision is dismissed on the grounds of mootness. NYSDEC has made significant revisions to its regulations, and the revised rules do not appear to impose the same requirements on regulated entities as the previous version of the rules that were challenged in this proceeding. It therefore

¹ At the time of NTTC's application, PHMSA did not exist. PHMSA was created on February 20, 2005, when the Secretary of Transportation re delegated hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to PHMSA's Administrator. For consistency, the terms "PHMSA," "the agency," and "we" are used throughout this decision, regardless of whether an action was taken by RSPA before February 20, 2005, or by PHMSA after that date.

does not appear that reconsidering PHMSA's preemption determination regarding the now-superseded NYSDEC rules would have any practical effect.

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SUPPLEMENTARY INFORMATION:

PETITIONER: New York State Department of Environmental Conservation.

LOCAL LAW AFFECTED: New York Codes, Rules and Regulations (NYCRR), Chapter 6, Sections 230.4(a)(3), 230.6(b) & (c).²

APPLICABLE FEDERAL REQUIREMENTS: Federal Hazardous Material Transportation Law (HMTA), 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

MODE AFFECTED: Highway.

I. Background

This proceeding was initiated in February 1998, when NTTC applied to PHMSA for a determination that the HMTA preempted certain marking and record keeping requirements of NYSDEC.

After NTTC filed its application, two key rulemakings occurred that delayed PHMSA's decision on NTTC's claims. The rulemakings, one initiated by PHMSA, and the other by the United States Environmental Protection Agency (EPA), although not related, addressed many of the issues raised in NTTC's application. The agencies'

² The NYSDEC repealed and replaced Part 230, with an effective date of February 11, 2021. The marking requirement in 6 NYCRR 230.4(a)(3), as amended, was recodified in 6 NYCRR 230.6(a)(2). The recordkeeping and retention requirements of 6 NYCRR 230.6(b) and (c), as amended, were recodified in 6 NYCRR 230.7(a)(1) and (a)(2), respectively.

rulemaking activities spanned several years and culminated in December 2009, when EPA issued a rule change and clarification of its rules.³

Earlier in 2009, and subsequent to the publication of final rules in each of the PHMSA and EPA rulemakings, but before EPA's clarification of its rules, PHMSA issued its decision on NTTC's application. On January 23, 2009, PHMSA published in the Federal Register its determination of NTTC's application in Preemption Determination No. 19(R) (PD-19(R)), 74 FR 4291.⁴ PHMSA found that the HMTA preempted the following NYSDEC requirements because the requirements were not substantively the same as requirements in the HMR on the marking, maintaining, repairing, or testing of a package or container that is represented, marked, certified, or sold as qualified for transporting hazardous material:

- 6 NYCRR 230.4(a)(3) – requirement that the marking must be a minimum two inches and contain “NYS DEC”;
- 6 NYCRR 230.6(b) – requirement for maintaining a copy of the most recent pressure-vacuum test results with the gasoline transport vehicle; and
- 6 NYCRR 230.6(c) – requirement to retain pressure-vacuum test and repair results for two years.

Within the 20-day time period provided in 49 CFR 107.211(a), NYSDEC submitted a petition for reconsideration of PHMSA's decision in PD-19(R). NYSDEC asked PHMSA to rescind its preemption determination and dismiss the application by NTTC. In April 2009, PHMSA extended the period for comments on NYSDEC's petition due to the unusually long period it took for the agency to issue PD-19(R). This action was followed by another extended period of inactivity until August 26, 2010, when PHMSA reopened the period for comments on NYSDEC's petition for reconsideration to

³ Final Rule, 73 FR 1916 (January 10, 2008); corrections, 73 FR 12275 (March 7, 2008); Final Rule with amendments and clarifications, 76 FR 4156 (January 24, 2011).

⁴ As published in the Federal Register, the agency's January 23, 2009 determination in PD-19(R) indicated an incorrect docket number (99-3559, instead of 98-3559).

receive comments on EPA's rule changes. The matter has remained dormant since that time based on PHMSA's understanding that NYSDEC was planning to revise its regulations.

On February 12, 2020, NYSDEC proposed a rulemaking to repeal and replace 6 NYCRR Part 230 Gasoline Dispensing Sites and Transport Vehicles. Volume XLII, Issue 6, N.Y. Reg. 8 (February 12, 2020). The adopted requirements in 6 NYCRR Part 230, sections 230.6 and 230.7, became effective on February 11, 2021. These provisions contain revised versions of the requirements that were at issue in this proceeding for marking gasoline transport vehicles and recordkeeping and reporting requirements.

II. Dismissal on Grounds of Mootness

NYSDEC's legislative changes to its rules have rendered moot NYSDEC's petition for reconsideration of PHMSA's 2009 preemption determination.

NYSDEC, in its February 12, 2020, rulemaking proposal, required pressure-vacuum cargo tank testing and markings that align with DOT's testing and marking requirements. NYSDEC indicated that the proposed amendments would make the requirements consistent on the state and federal level. Furthermore, NYSDEC proposed to revise the gasoline transport vehicle recordkeeping retention requirements from 2 years to 5 years in order to align with the current version of the EPA's recordkeeping requirement located at 40 CFR part 63 subpart CCCCCC.

The recently adopted requirements in 6 NYCRR Part 230, sections 230.6 and 230.7, became effective on February 11, 2021. These provisions contain the requirements that were at issue in this proceeding for marking gasoline transport vehicles and recordkeeping and reporting requirements. The provision for the marking of gasoline transport vehicles states:

(a) No owner or operator of a gasoline transport vehicle may transport gasoline or allow the vehicle to be filled or emptied in New York State unless the gasoline transport vehicle meets:

(1) the federal Department of Transportation (DOT) requirements for leak testing as required by 49 CFR 180.407(h) (see Table 1, Section 200.9 of this Title); and

(2) the federal DOT requirements for test markings as required by 49 CFR 180.415 (see Table 1, Section 200.9 of this Title).

6 NYCRR 230.6.

The recordkeeping and reporting provision states:

(a) The owner of any gasoline transport vehicle subject to the leak testing requirements outlined in section 230.6(a) of this Part shall keep:

(1) leak testing records with information as prescribed by 49 CFR 180.417(b)(1) and (2) (see Table 1, Section 200.9 of this Title) for 5 years; and

(2) a copy of the most recent leak testing results with the gasoline transport vehicle.

6 NYCRR 230.7.

In light of the facts and circumstances described above, it is apparent the NYSDEC rules that PHMSA found were preempted under the HMTA—and subject of NYSDEC’s petition for reconsideration—have been significantly revised. On their face, the revised rules do not appear to impose the same requirements on regulated entities as the previous version of the rules that were challenged in this proceeding. Consequently, it would be inappropriate for PHMSA to render a decision on a petition for reconsideration that was filed more than a decade ago, for relief from the agency’s preemption determination that was based on a previous version of NYSDEC’s pressure-vacuum cargo tank testing and markings requirements when those requirements have recently undergone significant revisions. It appears that issuing a decision on the petition for reconsideration would have no practical effect on any party.

III. Ruling

For the reasons set forth above, NYSDEC's petition for reconsideration is dismissed because the issues raised in the petition are moot.

Going forward, any person directly affected by the revised NYSDEC rules (including a State, political subdivision of a State, or Indian tribe) may apply to PHMSA for a decision on whether the revised rules are preempted by the HMTA. 49 U.S.C. 5125(d); 49 CFR 107.203. Similarly, any person who thinks there is a practical reason for PHMSA to revisit its preemption decision regarding the now-superseded rules may apply to PHMSA for a new decision on that question.

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